

**Supreme Court of the United States**

**OCTOBER TERM, 1939.**

**No. 563.**

**DELAWARE RIVER JOINT TOLL BRIDGE  
COMMISSION, PENNSYLVANIA-NEW JERSEY,**

**Petitioner,**

**v.**

**JOHN D. COLBURN and BESSIE COLBURN,**

**Respondents.**

**RESPONDENTS' BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI.**

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COMMISSION, PENNSYLVANIA-  
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Petitioner,

v.

JOHN D. COLBURN and BESSIE COLBURN,  
Respondents.

On Certiorari.

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### Official Report of Opinion Below.

The opinion of the New Jersey Court of Errors and Appeals in this cause was rendered and filed on September 22, 1939 (R. p. 278). The opinion is reported in 123 N. J. L. 197.

### Statement of the Case.

#### I.

John D. and Bessie Colburn own a modern dwelling house at 99 North Main Street, Phillipsburg, New Jersey. Before the building of a bridge abutment to the rear of their home by the Delaware River Joint Toll Bridge Commission, their

property constituted an integral part of the North End section of Phillipsburg. On the East, their property faced a high natural hill; on the West, while there were buildings between their property and the Delaware River, they enjoyed, because of the space between, and the varying heights of the irregular structures, a reasonable amount of light, ventilation and a view of the Delaware River, and the hill on the opposite side of the River. Further, by reason of the existence of seven separate thoroughfares, they had ready access to the entire section.

The Bridge Commission built an approach to the rear of the Colburn house. They caused the seven thoroughfares to be closed in whole or in part. The approach is one thousand feet long, ascends from street level to a height of forty feet where it meets with the bridge crossing the Delaware. It consists of solid dirt fill. The effect was to isolate completely the Colburn property in an artificially created valley. Access to the railroad, the river and the west is cut off. The abutment curtails light, ventilation and view. The Colburn property was thus depreciated in value.

The Colburns, in their application to the New Jersey Courts, contended that the injury to their property was compensable by reason of the express provisions of the New Jersey Statutes. Chapter 215 of the Laws of 1934, now R. S. 1937, 32:8-1, gives to the Bridge Commission the right to acquire property, defines "property" as including "claims for damages to real estate", and further provides as to New Jersey property, that eminent domain proceedings shall be pursued in accordance with the provisions of Chapter 297 of the Laws of 1912 as amended by Chapter 76 of the Laws of 1919, now R. S. 1937, 32:9-1, *et seq.*, which specifically sets out that the Commission should view "premises affected", notify "persons affected" and award damages for "property taken, injured or destroyed", and "state to whom the damages are payable".

The Colburns, with some of their neighbors, applied to the New Jersey Supreme Court in October, 1937, for a rule to show cause why a writ of mandamus compelling the Commission to proceed to estimate the damages should not issue. The rule was granted. The matter was argued upon stipulated facts and exhibits before the January, 1938, Term of the New Jersey Supreme Court. No federal question was raised by the Commission either in its brief or its argument to the Court. In March, 1938, the New Jersey Supreme Court ruled that alternative writs of mandamus should issue. The Court suggested the joinder of all owners as co-relators was probably improper and confusing. An order was entered awarding alternative writs to each of the owners. The embankment to the rear of Colburns' property and that of four other relators is approximately thirty-five feet high, and the Colburn case, as typical of that group, was prosecuted.

Thus, the Bridge Commission filed an answer to the alternative writ, and subsequent pleadings were filed (R. pp. 20-35). No federal question was raised by the pleadings or at the trial. The fact issues were tried at Circuit, before a judge and jury. The findings were certified by postea to the New Jersey Supreme Court (R. pp. 35-41), which entered judgment (R. pp. 42-46), directing the issuance of a peremptory writ. The Bridge Commission then appealed to the New Jersey Court of Errors and Appeals. Its grounds of appeal (R. pp. 2-13), raised no federal question, nor was such question argued to the court, which thereafter affirmed the judgment of the Supreme Court. The opinion (R. p. 278) neither presents nor decides a federal question. The first time petitioner attempted to raise a "purported" federal question is on this application.

The question decided by the Court of Errors and Appeals is not one of novel impression either in New Jersey or throughout the country. By state statute (P. L. 1919, C. 76), the Bridge Commission is directed to award dam-

ages for "property taken, injured or destroyed". Though the New Jersey Constitution does not require that consequential damages be awarded to a property owner whose property is injured by a public improvement, it has repeatedly been held that damages would be awarded if a statute created or allowed such a right.

*Burns Holding Corp. v. State Highway Commission*, 8 N. J. Misc. 452, aff'd 108 N. J. L. 401; *Newark v. Hatt*, 79 N. J. L. 548; *Lewis on Eminent Domain* (3d ed.), secs. 359, 360, 354.

### Summary of Argument.

The petition for a writ of certiorari should be dismissed because:

#### I.

No federal question is presented—the question presented for review is the construction of a state statute by the highest court of New Jersey.

#### II.

Assuming a federal question is presented, there is no showing that a federal question was presented for decision or actually decided by the Court of Errors and Appeals of New Jersey.

#### III.

Assuming that the question for review is the construction of the interstate compact between New Jersey and Pennsylvania, a federal question is not presented.

#### IV.

It is clear that under the pertinent statutory provisions, the respondents are entitled to consequential damages.



## **ARGUMENT**

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### **POINT I**

**The petition for writ of certiorari should be dismissed because no federal question is presented—the question presented for review is the construction of a state statute by the highest court of New Jersey.**

The interstate compact (U. S. 1935, Public—No. 411—44th Congress as set forth in Petitioner's petition, pp. 8, etc.) being joint legislation of each state, provides in Article II that the Commission shall have the general powers (j) To acquire, own", etc., "real property \* \* \*", and "(m) to exercise the power of eminent domain." Article III of the compact enacts specifically the method the Commission shall acquire real property and exercise the power of eminent domain. Paragraph 3 of Article III (Petitioner's petition, p. 12) specifically states that if the Commission cannot agree with an owner as to the terms of acquisition, the Commission can then acquire real property by the exercise of the right of eminent domain "in the manner provided by the Act of the State of New Jersey, entitled 'An Act authorizing the acquisition and maintaining by the State of New Jersey, in conjunction with the State of Pennsylvania, of toll bridges across the Delaware River; and providing for free travel across the same', approved the first day of April, one thousand nine hundred and twelve (Chapter two hundred ninety-seven), and the various acts, amendatory thereof and supplementary thereto, relating to the acquisition of inter-State toll bridges over the Delaware River."

In other words, both states by a compact consented to by Congress, agreed that as far as New Jersey property was concerned, compensation should be made in accordance with



the provisions of a New Jersey statute enacted by the New Jersey Legislature in 1912 (P. L. 1912, Chapter 297) as amended by P. L. 1919, Chapter 76 (now Revised Statutes of 1937, 32:9-6). This statute is not part of an interstate compact. It provides that if the Commission cannot agree with an owner as to compensation, "The said Commission shall appoint a time not less than twenty nor more than thirty days therefrom, when they shall meet upon the property and view the same, *and the premises affected thereby*; and shall give at least ten days personal notice of the time and place of the first meeting to the Attorney General of this State, and to the president, secretary or director of any corporation, stock company or to any partnership or persons effected \* \* \*", and then continues:

"The joint commission, having viewed the premises or examined the property, shall hear all parties interested and their witnesses, and shall estimate the value of the property taken, including any easements, rights or franchises incident thereto as well as the damages for property taken, injured or destroyed, and shall state to whom the damages are payable."

It was this New Jersey statute on which the New Jersey Court of Errors and Appeals relied (R. p. 279). It was this New Jersey statute and its interpretation on which the Supreme Court originally allowed mandamus (R. p. 18), on which the alternative writ was predicated (R. p. 23), on which judgment that a peremptory writ issue was based (R. pp. 44-46).

It is, of course, elementary that the interpretation of a state Statute, does not present a federal question for review by the Supreme Court of the United States.

*Adams v. Russell*, 229 U. S. 353;

*Kennedy v. Craven*, 251 U. S. 125.

## POINT II

The petition for a writ of certiorari should be dismissed because even assuming a federal question is presented there is no showing that a federal question was presented for decision or actually decided by the Court of Errors and Appeals of New Jersey.

It is elementary that before jurisdiction will be taken by the Supreme Court of the United States; it must be shown that a Federal question was argued or presented to the Court below for decision, that its decision was necessary to the determination of the cause, and that it was actually decided, or that judgment as rendered could not have been given without deciding it.

*Honeyman v. Hanan*, 300 U. S. 14;

*Commercial National Bank v. Buckingham*, 5 How. 317 at 341;

*Parmelee v. Laurence*, 11 Wall 36 at 38.

Assuming *arguendo* that a federal question is involved, the record conclusively shows that a federal question was never presented to the New Jersey Court of Errors and Appeals or to any of the lower courts. The grounds of Appeal (R. pp. 2-13) reveal no complaint as to the construction of an interstate compact. They merely complain that the lower State Courts had not properly construed New Jersey Statutes. The opinion by the Court of Errors and Appeals involves merely the construction of a New Jersey Statute.

The petitioner for the first time in its appeal to this Court raises what it terms a federal question. This it cannot do.

### POINT III

The petition for a writ of certiorari should be dismissed because even assuming that the question for review is the construction of the interstate compact between New Jersey and Pennsylvania a federal question is not presented.

Petitioner has urged that the determination of the effect of an interstate compact presents a federal question. As has been indicated, the real question at issue is the interpretation of a state statute which both states have directed shall govern in the event New Jersey property is affected. But assuming that the question involved is the construction of an interstate compact, that, in itself, does not present a federal question.

*People v. Central Railroad*, 12 Wall 455;

*Hamburg American Steamship Co. v. Grube*, 196 U. S. 407;

35 *Columbia Law Review* 76 at 80-84.

The assent of Congress to the compact does not make it a "treaty or statute of the United States", within the meaning of sec. 237 of the Judicial Code.

*Hinderlider v. La Plata River and Cherry-Creek Ditch Co.*, 304 U. S. 92;

*People v. Central Railroad*, 12 Wall 455.

In none of the cases cited by petitioner did jurisdiction rest on the fact that the interpretation of an interstate compact was involved. In each case, jurisdiction was taken for some other reason.

In *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, *supra*, it was noted (p. 110):

"The decisions are not uniform as to whether the interpretation of an interstate compact presents a federal question."

The Court rested its jurisdiction to review on the ground that the apportionment of water of an interstate stream presented a question of "federal common law" and refused to rest its right to review on the fact that the interpretation of a compact was involved.

In *Kentucky v. Indiana*, 281 U. S. 163, while a controversy arose as to an interstate compact, this Court based its jurisdiction on the constitutional provision giving its original jurisdiction in suits between states.

Again, in *Pennsylvania v. Wheeling & Belmont Bridge Company*, 13 Howard 518, although an interstate compact was involved, it was decided that the Court had original jurisdiction because a state was a party and had a direct interest in the controversy.

In *Green v. Biddle*, 8 Wheat. 1, the Supreme Court reviewed a lower federal court decision involving an interstate compact, the allegation of which, it was alleged, had been impaired by a later statute. The jurisdiction to review was specifically rested upon the constitutional provision against the impairment of contracts.

Petitioner further contends that the New Jersey statute (P. L. 1912, c. 297 as amended by the P. L. 1919, c. 76), as construed by the New Jersey court impairs the obligation of the compact entered into by New Jersey and Pennsylvania in 1934. The contention is without merit. Even if the constitutional prohibition against impairment of contracts, applies to "compacts", in no event can there be an impairment by a judicial interpretation of a pre-existing statute; the question can arise only as to subsequent legislation. Further, the compact expressly provides that the New Jersey statute shall apply to New Jersey property. And finally, it is well settled that a change of judicial decision as to the construction of a state statute does not render the changed construction and impairment of contract obligations entered into upon faith of the prior construction a legislative change within the prohibitions

of the Federal Constitution forbidding legislative impairment of contracts.

*Fleming v. Fleming*, 264 U. S. 29.

## POINT IV

The petition for a writ of certiorari should be dismissed because it is clear that under the pertinent statutory provisions, the respondents are entitled to consequential damages.

Petitioner argues that the Act of 1934 (P. L. 1934, C. 215, Compact, Petitioner's Petition, p. 8) sets forth alternative methods by which it may exercise the right of eminent domain. The point was not raised below, and is without merit. The compact (Petitioner's Petition, pp. 8, etc.) provides one method of acquiring real property in New Jersey. Article II gives the Commission the right to acquire real property and the power of eminent domain. Article III then sets out how, and in what manner that power is to be exercised as to New Jersey property—in accordance with the provisions of P. L. 1912 C. 297, as amended or supplemented. The compact sets forth only one way of exercising the powers granted by Article II—that set out in Article III—no alternatives are set forth.

Petitioner argues that the authorities show that New Jersey never has admitted a right to consequential damages where property is not actually taken, and that Pennsylvania has abandoned its recognition of such a right. The cases are to the contrary.

Consequential damages have been held recoverable in New Jersey when the right is recognized, by Statute.

*Newark v. Hatt*, 79 N. J. L. 548;

*Burns Holding Corp. v. State Highway Commission*, 8 N. J. Misc. 452, aff'd 108 N. J. L. 401.

Similarly, in Pennsylvania and elsewhere, consequential damages have been held recoverable under statutes or constitutional provisions allowing damages for "property taken, injured or destroyed".

*Pennsylvania Railroad v. Miller*, 132 U. S. 75;  
*Chester County v. Brower*, 12 Atl. (Pa.) 577;  
*Lewis on Eminent Domain* (3d ed.), Secs. 359, 360,  
 354.

Further, the Pennsylvania courts have held that the constitutional provision or similar statutes providing damages for "property taken, injured or destroyed" applies to all owners whose property is sufficiently near to the improvement to make the injury proximate, immediate and substantial.

*Mellor v. Philadelphia*, 160 Pa. 614;  
*Bodemer v. Northampton County*, 101 Pa. Super.  
 Ct. 492;  
*In re Melon St.*, 182 Pa. 397.

Respondents exaggerate the complications arising out of the decision and over emphasize the likelihood of the Bridge Commission paying excessive damages. It is to be noted that the mandate of the New Jersey court merely requires the Bridge Commission to estimate the damages, if any there are, and to say to whom they shall be awarded in accordance with New Jersey law.

It is respectfully submitted that the petitioner has not presented such a case as to justify the grant of a writ of certiorari.

**Conclusion.**

The application for the writ of certiorari should be denied.

Respectfully submitted,

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